

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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CHARLES MORRIS,

Plaintiff,

v.

ROMEO ARANAS, *et al.*,

Defendants.

Case No. 3:18-CV-0310-RCJ-CLB

**REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE¹**

[ECF Nos. 65, 83]

This case involves a civil rights action filed by Plaintiff Charles Morris (“Morris”) against Defendants Romeo Aranas (“Aranas”), Isidro Baca (“Baca”), Shelly Conlin (“Conlin”), Richard Long (“Long”), David Mar (“Mar”), Melissa Mitchell (“Mitchell”), and William Miller (“Miller”) (collectively referred to as “Defendants”). Currently pending before the Court is Defendants’ motion for summary judgment. (ECF Nos. 65, 66, 68.)² Morris opposed the motion, (ECF Nos. 75, 76), and filed a cross-motion for summary judgment, (ECF Nos. 75, 76, 82, 83).³ Defendants opposed Morris’s cross-motion, (ECF No. 84), and Morris filed a reply in support of his cross-motion. (ECF No. 89). Defendants did not file a reply in support of their motion. For the reasons stated below, the Court recommends that Defendants’ motion for summary judgment, (ECF No. 65), be denied, and Morris’s cross-motion for summary judgment, (ECF No. 83) be denied.

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¹ This Report and Recommendation is made to the Honorable Robert C. Jones, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4.

² ECF No. 66 is a 220-page appendix of exhibits to the motion. ECF No. 68 comprises sealed medical record exhibits.

³ ECF No. 75 is Morris’s opposition and cross-motion for summary judgment. ECF No. 76 consists of exhibits filed in support of Morris’s opposition and cross-motion. ECF Nos. 82 and 83 are duplicate copies of ECF Nos. 75 and 76, the opposition, cross-motion, and exhibits.

1 **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

2 Morris is an inmate in the custody of the Nevada Department of Corrections
3 ("NDOC") and is currently housed at Northern Nevada Correctional Center ("NNCC").
4 Morris initiated this action on June 27, 2018. (ECF No. 1.) He submitted a civil rights
5 complaint pursuant to 42 U.S.C. § 1983 against multiple Defendants for events that took
6 place while he was incarcerated.⁴ (ECF No. 43). Morris's second amended complaint,
7 which is the operative complaint in this case, includes two claims. The first is an Eighth
8 Amendment deliberate indifference to serious medical needs claim against Defendants
9 Aranas, Long, Mitchell, and Mar, and the second is an Eighth Amendment deliberate
10 indifference to serious threats to inmate's safety claim against Defendants Baca, Miller,
11 and Conlin. (*Id.*)

12 In Count I, Morris alleges the following: prison officials knew Morris had serious
13 back problems and, thus, repeatedly transferred him to prisons with flat yards and to the
14 regional medical center. Prison officials appeared to delay medical treatment by refusing
15 to provide MRIs to confirm Morris's back injuries and then delayed/denied surgery once
16 an MRI confirmed the need for surgery. Instead of surgery, prison officials issued Morris
17 a walker and cane. Morris's delay in treatment led to his legs collapsing and seriously
18 injuring himself on the stairs, which further led to the need for emergency surgery. (*Id.* at
19 6-16.)

20 In Count II, Morris alleges the following: prison officials knew for 15 years that
21 Morris was classified to a lower tier, lower bunk restriction due to his spinal issues and
22 need to use a walker and cane. However, in 2018, prison officials explicitly ordered Morris
23 to a top tier and refused to move Morris to a lower tier until he fell down the stairs and
24 partially paralyzed himself. (*Id.* at 17-19.)

25

26 ⁴ Morris was transferred five times between four facilities (NNCC, Lovelock
27 Correctional Center, Ely State Prison, and High Desert State Prison) throughout the time
28 period of his complaint, as will be more fully discussed below. (See ECF No. 66-1 at 80-
81.)

On June 21, 2021, Defendants filed a motion for summary judgment arguing they were not deliberately indifferent to Morris's serious medical needs or threats to his safety, they are entitled to qualified immunity, several Defendants lack personal participation, no NDOC personnel created an unsafe condition, Morris is not entitled to injunctive relief, and he failed to exhaust his administrative remedies. (ECF No. 65.) Morris opposed the motion and filed a cross-motion for summary judgment, (ECF Nos. 75, 83). Morris moves for summary judgment on his unsafe prison conditions claim, only. (*See id.*) Defendants opposed Morris's cross-motion, (ECF No. 84), and Morris filed a reply in support of his cross-motion for summary judgment. (ECF No. 89). Defendants did not file a reply in support of their motion for summary judgment.

II. UNDISPUTED FACTS

A. Medical History re: Back Pain⁵

During Morris's intake at ESP on October 19, 1999, Morris appears to have first reported his back problems to the NDOC. (ECF No. 66-1 at 42.) On January 12, 2015 and January 20, 2015, Morris filed two kites stating he was "offered surgery some years back" that he declined.⁶ (*Id.* at 6-7.) Defendants claim Morris did not produce evidence of the referral for surgery nor sign a HIPAA release to obtain these records.⁷

After filing these kites, Morris was told he would be scheduled to see a physician. (*Id.* at 6.) Morris had x-rays done on February 20, 2015 and requested the results on March 8, 2015. (ECF No. 68-5 at 11-12, ECF No. 66-1 at 4.) On March 18, 2015, a request

⁵ Defendants only include copies of Morris's medical kites from January 2015 to October 2019, (ECF Nos. 66 at 37-110, 66-1 at 1-8), his medical consultation reports from March 2015 to October 2019, (ECF No. 68-1), physician's orders from November 2014 to October 2019, (ECF No. 68-3), and progress notes from January 2015 to October 2019, (ECF No. 68-4).

⁶ NDOC claims to have no records of any prior offer of surgery to Morris and Morris did not specify any further details on this offer.

⁷ It is unclear why a HIPAA release would be necessary to obtain these medical records, as Morris has been in NDOC custody continuously since 1999 and these records should already be in the NDOC's possession.

1 was made by an NDOC practitioner for Morris to have an MRI and surgery; therefore, an
2 appointment was made for Morris to see Dr. Long, an orthopedic surgeon. (ECF No. 68-
3 1 at 46.)

4 Morris was seen by Dr. Long on May 13, 2015, for low back pain. (*Id.* at 45.)
5 Following the examination, Dr. Long stated he could not “make any determination ... [and]
6 was unable to isolate any significant objective findings, only subjective complaints.” (*Id.*)
7 Dr. Long further stated he was “not sure about recommending an MRI.” (*Id.*) On June 19,
8 2015, Morris submitted a kite requesting information about what Dr. Long had ordered
9 following his examination. (ECF No. 66-1 at 1.) Morris was told that Dr. Long did not order
10 anything and quoted his lack of findings. (*Id.*)

11 Morris submitted multiple kites in 2015 and 2016 concerning his back pain. (ECF
12 No. 66 at 71-110; ECF No. 66-1 at 1-8.) On November 30, 2015, a MRI was requested
13 and performed on February 16, 2016, which indicated “disc herniation at L4-L5 . . . [and]
14 foraminal stenosis. . . .” (ECF No. 68-1 at 43, ECF No. 68-5 at 10.) Thereafter, Dr. Vicuna
15 requested a “spine surgeon” on March 18, 2016. (ECF No. 68-1 at 40.) The request was
16 authorized by the UR Panel on March 29, 2016. (*Id.*) On May 12, 2016, Morris submitted
17 a “second request” to be seen following his MRI and was told to “wait for an appointment.”
18 (ECF No. 66 at 94.)

19 On May 20, 2016, Morris filed an informal grievance concerning the requested
20 back surgery, his pain level, numbness in his legs, inability to stand for periods of time,
21 and claiming he was collapsing and falling and having trouble using the restroom due to
22 his back. (ECF No. 66 at 16-22.) Morris’s grievance alleged that he was being transferred
23 between facilities even though he required a “medical flat yard.” (*Id.*) It appears from
24 Morris’s bed assignment records that from January 27, 2015 until May 20, 2016, the date
25 of the grievance, Morris was transferred four times between several facilities. (ECF No.
26 66-1 at 80.) In March of 2016, Morris alleged he was being transferred to different NDOC
27 facilities to delay his treatment. (ECF No. 66 at 5-22.) However, on September 19, 2016,
28 Morris stated he was transferred from SDCC to NNCC due of “extreme back pain”

1 because “SDCC couldn’t help.” (ECF No. 66 at 83.)

2 On August 3, 2016, Morris submitted a medical kite stating his condition was
3 “worsening fast” and he had “non-stop pain.” (ECF No. 66 at 86.) NDOC’s response was
4 to use a form response on the kite which states, “The Medical schedule is based on
5 priority needs and the current waiting time; you will be seen in 2–4 weeks. If your condition
6 worsens, please submit a kite for nursing sick call.” (*Id.*)

7 Morris was seen for his back pain on August 12, 2016 by Michael Schneier, M.D.
8 (“Schneier”) of the Khavkin Clinic, NDOC’s outside medical provider at the time. (ECF No.
9 68-1 at 31.) Schneier noted that Morris had tried the medication “Medrol Dosepak without
10 remediation of symptoms . . . and Morris had an MRI.” (*Id.*) Schneier’s assessment was
11 degenerative disc disease lumbar, pain lumbar and spondylolysis lumbar. (*Id.* at 31.)
12 Schneier ordered a “lumbar MRI w/o con – open” and a “pain a management
13 consultation.” (*Id.*) Schneier also noted that “further discussion regarding the surgical
14 planning will be based on a review of hard copy of the MRI with possible need to refer for
15 open MRI.” (*Id.*) Schneier’s plan was to treat him with facet and transforaminal injections
16 at L4-L5. (*Id.*)

17 Morris claims he was issued a walker and a cane on October 7, 2016. (ECF No. 6
18 at 13.) Morris filed a medical kite on November 21, 2016 about his back pain and asking
19 for help with pain management. (ECF No. 66 at 74.) Morris further complained that he
20 was constantly being told to “lose some weight and 100 lbs at that but how can I lose 100
21 lbs when at most times I can’t even walk? Help me lost the weight because I desperately
22 need this surgery because I’m in constant pain 24/7. . . .” (*Id.*)

23 On January 25, 2017, an NNCC practitioner requested that Morris be seen by
24 Long. (ECF No. 68-1 at 30.) The practitioner noted that Morris “is in need of surgery, but
25 not until he loses weight.” (*Id.*) On June 14, 2017, Morris was seen by Long for his “severe
26 lumbar spinal stenosis, with pain radiating down into his lower extremities, and decreased
27 sensation and marked weakness, particularly with ambulation.” (*Id.* at 29.) Long also
28 noted that since he had last seen Morris, in March 2017, Morris had fallen twice. (*Id.*)

1 Long recommended that Morris “continue walker with chair” and stated “an epidural may
2 give very temporary relief” and “[p]erhaps a neurosurgical evaluation could be
3 considered.” (*Id.*) The recommendations stated that Morris may continue with walker, and
4 an epidural “may” give temporary relief. *Id.* It continues to recommend “a neurosurgical
5 evaluation could be considered.” (*Id.*)

6 On June 28, 2017, Morris was referred to Sierra Neurosurgery for “eval/treatment.”
7 on June 28, 2017. (*Id.* at 28.) On October 13, 2017, Sierra Neurosurgery requested an
8 updated MRI before scheduling an appointment with Morris. (*Id.* at 26.) On November 2,
9 2017, Morris sent a medical kite stating he was told “a few months ago” that he was “put
10 in for back surgery” and was wondering the status as he was “still in grave pain.” (ECF
11 No. 66 at 57.) The response to the kite states “seen by Sierra Neurosurgery & surgery
12 completed” with a date of February 8, 2018. (*Id.*)

13 On February 2, 2018, correctional officers called a “man-down” after Morris fell
14 down the stairs in his housing unit. (ECF No. 68-4 at 11, ECF No. 68-8 at 3, ECF No. 66-
15 1 at 83.) Morris stated his leg “gave out” and it felt like something was “sticking in his
16 back.” (ECF No. 68-4 at 11.) Morris was taken by ambulance to Carson Tahoe Hospital
17 and then transferred to Renown Hospital where he had emergency back surgery
18 performed on February 3, 2018 by Dr. Song—NDOC’s outside medical provider at the
19 time—for a “massive L4-L5 dis[c] herniation with dense bilateral paraparesis.” (ECF No.
20 68-1 at 16.) Morris was seen post-operatively on February 23, 2018, where Morris
21 reported complete relief of right lower extremity pain, some shooting pain in the left lateral
22 thigh, weakness and numbness in the left foot and significant spasms in the low back and
23 left leg. (ECF No. 68-1 at 14.) A discussion was had about weaning Morris off narcotic
24 pain mediation at 90 days post-op. (*Id.* at 15.)

25 On March 12, 2018, Morris kited about numbness and pain in his left leg and foot
26 along with “bad spasms” causing pain. (ECF No. 66 at 53.) On March 21, 2018, Morris
27 kited about being in pain, and was seen on March 28, 2018. (ECF No. 66 at 51, ECF No.
28 68-3 at 8.) Several orders were entered for medication between April 2018 and November

1 2018. (ECF No. 68-3 at 7.) On December 20, 2018, an NDOC practitioner requested a
2 “consult post L4-L5 disc bulge repair for pain continuing since operation.” (ECF No. 68-1
3 at 12.)

4 On or about April 4, 2019, Dr. Song requested an MRI prior to Morris’s next visit,
5 and the MRI was taken on May 28, 2019. (ECF No. 68-1 at 4-11, ECF No. 68-5 at 2-3.)
6 On April 8, 2019, Morris filed an emergency grievance regarding continuous stabbing pain
7 in his back. (ECF No. 68-7 at 6.)

8 On June 04, 2019, Morris was seen by a physician assistant (“PA”) of Dr. Song at
9 Advanced Neurosurgery for low back pain and left lower extremity symptoms. (ECF No.
10 68-1 at 4-7.) Dr. Song compared Morris’s May 28, 2019 MRI with his February 2, 2018
11 MRI. (ECF No. 68-5 at 2-3.) The PA’s assessment explained that Morris was overall
12 improved in his symptoms and that his “right lower extremity symptoms” were completely
13 resolved. (ECF No. 68-1 at 6.) The assessment noted, Morris had “chronic neurological
14 defect in his left lower extremity including left foot drop as well as weakness, tingling and
15 numbness and chronic pain.” (*Id.*) For this, he was recommended a consult to rehab
16 without any additional surgical intervention or diagnostic testing at the time. (*Id.*)

17 **B. Medical Classification and Housing**

18 Morris’s offender information summary (“OIC”) shows that on October 19, 1999,
19 when Morris went through initial intake at ESP, he had a lower bunk restriction per
20 medical. (ECF No. 66-1 at 42.) During a reclassification on October 14, 2002, Morris’s
21 OIC again notes that Morris “requires a lower bunk due to problems with his lower back.”
22 (*Id.* at 45.) A reclassification held on August 26, 2005 at Nevada State Prison (“NSP”)
23 notes placement on “lower tier.” (*Id.* at 48.) A reclassification/periodic review held on
24 October 2, 2008 notes Morris “requires a medical bottom bed.” (*Id.* at 51.) A
25 reclassification/periodic review held on March 20, 2009, notes Morris requires “a medical
26 bottom bed.” (*Id.*) A reclassification held on June 19, 2009 notes Morris “requires a
27 medical bottom bed” and also has been issued a cane from medical. (*Id.*) A general case
28 note entered in Morris’s OIC on May 27, 2010 states Morris “has lower bunk restriction.”

1 (*Id.* at 52.) Entries on March 31, 2011, April 6, 2011, May 25, 2011, and October 13, 2011
2 again state Morris has a lower bunk/lower tier restriction. (*Id.* at 54-55.) A general case
3 note entered on June 26, 2014 states “Added Disability-Bottom Bunk Alert per 10/11/11
4 Medical Restriction.” (*Id.* at 56.) A reclassification note entered on June 23, 2016 states:
5 “severe medical/mobility issues.” (*Id.* at 58-59.) The last explicit reference in the OIC to
6 Morris’s lower bunk/lower-tier restriction before the incident at issue is noted on
7 September 15, 2016. (*Id.* at 59.)

8 Defendants include as exhibits health classification and restriction forms for May
9 2015, August 2016, January 2017, and February 2017. (ECF Nos. 68-2.) Each of these
10 check-box forms indicate both lower bunk and lower floor/no stair medical restrictions.
11 (*Id.*) The lower bunk restriction is number 9 and lower floor/no stairs restriction is number
12 10. (*Id.*) In reviewing Morris’s OIC, Morris has consistently had a lower bunk/lower floor
13 medical restriction noted since 1999. (ECF No. 66-1 at 42.) A review of records conducted
14 on July 28, 2017 notes “Med rest – 2/3, 5, 11, 9, 8, 10” (*Id.* at 59), which the Court
15 interprets to mean medical restriction 9 and 10, i.e., lower bunk and lower floor
16 restrictions. A reclassification entry on February 6, 2018 states “MED – 2/3, 5, 11, 9, 8,
17 10” (*Id.* at 60.)

18 On October 6, 2017, an officer found a cell phone and a charger inside Morris’s
19 pillow, and he was served with a notice of charges. (ECF No. 66-1 at 41, 60, 86.) On
20 October 6, 2017, Morris was taken by other officers to a cell located on a top tier and on
21 a top bunk. (ECF No. 66-1 at 81.) Morris claims he complained on the way to the cell that
22 he had a bottom-tier classification and was not to be housed upstairs. (ECF No. 76 at 7.)
23 Morris was disciplined for the cell phone incident. (*Id.* at 15, 60.) Lt. Miller was the
24 charging officer at Morris’s disciplinary hearing. (ECF No. 66 at 35; ECF No. 66-1 at 91.)
25 Miller submitted a declaration stating he was not involved in assigning Morris’s bunk.
26 (ECF No. 66; ECF No. 66-1 at 91- 93.) However, Baca asserted in a response to a request
27 for interrogatory that “the bed move sheet and change of classification would have been
28 completed by Lt. Miller.” (ECF No. 83 at 116.)

1 Warden Baca's duties as warden do not include making housing assignments or
 2 medical decisions whether it be medications, treatments, tests and labs, or medical
 3 classifications as to housing restrictions. (ECF No. 66-1 at 107-110.) However, Miller
 4 asserted in a response to a request for interrogatory that "Warden Isidro Baca ordered
 5 [him] to reassign [Morris] to unit 7B." (ECF No. 83 at 139.)

6 Caseworker Conlin was the caseworker in administrative segregation at the time
 7 of the incident and Morris contends he asked Conlin at every available opportunity about
 8 his bunk assignment, while Conlin claims Morris did not. (ECF No. 76 at 7; ECF No. 66-
 9 1 at 103.) As a caseworker, Conlin would have had access to an inmate's health
 10 classification through the NOTIS system. (ECF No. 65 at 7.) Morris submitted seven kites
 11 from October 2017 until January 2018, prior to his fall on February 2, 2018, which did not
 12 address his top tier/top bunk situation. (ECF No. 66 at 54-60.)

13 **III. LEGAL STANDARDS**

14 "The court shall grant summary judgment if the movant shows that there is no
 15 genuine dispute as to any material fact and the movant is entitled to judgment as a matter
 16 of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The
 17 substantive law applicable to the claim or claims determines which facts are material.
 18 *Coles v. Eagle*, 704 F.3d 624, 628 (9th Cir. 2012) (citing *Anderson v. Liberty Lobby*, 477
 19 U.S. 242, 248 (1986)). Only disputes over facts that address the main legal question of
 20 the suit can preclude summary judgment, and factual disputes that are irrelevant are not
 21 material. *Frlekin v. Apple, Inc.*, 979 F.3d 639, 644 (9th Cir. 2020). A dispute is "genuine"
 22 only where a reasonable jury could find for the nonmoving party. *Anderson*, 477 U.S. at
 23 248.

24 The parties subject to a motion for summary judgment must: (1) cite facts from the
 25 record, including but not limited to depositions, documents, and declarations, and then
 26 (2) "show[] that the materials cited do not establish the absence or presence of a genuine
 27 dispute, or that an adverse party cannot produce admissible evidence to support the fact."
 28 Fed. R. Civ. P. 56(c)(1). Documents submitted during summary judgment must be

1 authenticated, and if only personal knowledge authenticates a document (i.e., even a
2 review of the contents of the document would not prove that it is authentic), an affidavit
3 attesting to its authenticity must be attached to the submitted document. *Las Vegas*
4 *Sands, LLC v. Neheme*, 632 F.3d 526, 532-33 (9th Cir. 2011). Conclusory statements,
5 speculative opinions, pleading allegations, or other assertions uncorroborated by facts
6 are insufficient to establish the absence or presence of a genuine dispute. *Soremekun v.*
7 *Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007); *Stephens v. Union Pac. R.R. Co.*,
8 935 F.3d 852, 856 (9th Cir. 2019).

9 The moving party bears the initial burden of demonstrating an absence of a
10 genuine dispute. *Soremekun*, 509 F.3d at 984. “Where the moving party will have the
11 burden of proof on an issue at trial, the movant must affirmatively demonstrate that no
12 reasonable trier of fact could find other than for the moving party.” *Soremekun*, 509 F.3d
13 at 984. However, if the moving party does not bear the burden of proof at trial, the moving
14 party may meet their initial burden by demonstrating either: (1) there is an absence of
15 evidence to support an essential element of the nonmoving party’s claim or claims; or (2)
16 submitting admissible evidence that establishes the record forecloses the possibility of a
17 reasonable jury finding in favor of the nonmoving party. See *Pakootas v. Teck Cominco*
18 *Metals, Ltd.*, 905 F.3d 565, 593-94 (9th Cir. 2018); *Nissan Fire & Marine Ins. Co. v. Fritz*
19 *Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). The court views all evidence and any
20 inferences arising therefrom in the light most favorable to the nonmoving party. *Colwell v.*
21 *Bannister*, 763 F.3d 1060, 1065 (9th Cir. 2014). If the moving party does not meet its
22 burden for summary judgment, the nonmoving party is not required to provide evidentiary
23 materials to oppose the motion, and the court will deny summary judgment. *Celotex*, 477
24 U.S. at 322-23.

25 Where the moving party has met its burden, however, the burden shifts to the
26 nonmoving party to establish that a genuine issue of material fact actually exists.
27 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, (1986). The
28 nonmoving must “go beyond the pleadings” to meet this burden. *Pac. Gulf Shipping Co.*

1 *v. Vigorous Shipping & Trading S.A.*, 992 F.3d 893, 897 (9th Cir. 2021) (internal quotation
2 omitted). In other words, the nonmoving party may not simply rely upon the allegations or
3 denials of its pleadings; rather, they must tender evidence of specific facts in the form of
4 affidavits, and/or admissible discovery material in support of its contention that such a
5 dispute exists. See Fed.R.Civ.P. 56(c); *Matsushita*, 475 U.S. at 586 n. 11. This burden is
6 “not a light one,” and requires the nonmoving party to “show more than the mere existence
7 of a scintilla of evidence.” *Id.* (quoting *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387
8 (9th Cir. 2010)). The non-moving party “must come forth with evidence from which a jury
9 could reasonably render a verdict in the non-moving party’s favor.” *Pac. Gulf Shipping*
10 *Co.*, 992 F.3d at 898 (quoting *Oracle Corp. Sec. Litig.*, 627 F.3d at 387). Mere assertions
11 and “metaphysical doubt as to the material facts” will not defeat a properly supported and
12 meritorious summary judgment motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,
13 475 U.S. 574, 586–87 (1986).

14 When a *pro se* litigant opposes summary judgment, his contentions in motions and
15 pleadings may be considered as evidence to meet the non-party’s burden to the extent:
16 (1) contents of the document are based on personal knowledge, (2) they set forth facts
17 that would be admissible into evidence, and (3) the litigant attested under penalty of
18 perjury that they were true and correct. *Jones v. Blanas*, 393 F.3d 918, 923 (9th Cir.
19 2004).

20 Upon the parties meeting their respective burdens for the motion for summary
21 judgment, the court determines whether reasonable minds could differ when interpreting
22 the record; the court does not weigh the evidence or determine its truth. *Velazquez v. City*
23 *of Long Beach*, 793 F.3d 1010, 1018 (9th Cir. 2015). The court may consider evidence in
24 the record not cited by the parties, but it is not required to do so. Fed. R. Civ. P. 56(c)(3).
25 Nevertheless, the court will view the cited records before it and will not mine the record
26 for triable issues of fact. *Oracle Corp. Sec. Litig.*, 627 F.3d at 386 (if a nonmoving party
27 does not make nor provide support for a possible objection, the court will likewise not
28 consider it).

1 IV. DISCUSSION

2 A. Civil Rights Claims Under 42 U.S.C. § 1983

3 42 U.S.C. § 1983 aims “to deter state actors from using the badge of their authority
4 to deprive individuals of their federally guaranteed rights.” *Anderson v. Warner*, 451 F.3d
5 1063, 1067 (9th Cir. 2006) (quoting *McDade v. West*, 223 F.3d 1135 1139 (9th Cir. 2000)).
6 The statute “provides a federal cause of action against any person who, acting under
7 color of state law, deprives another of his federal rights[,]” *Conn v. Gabbert*, 526 U.S. 286,
8 290 (1999), and therefore “serves as the procedural device for enforcing substantive
9 provisions of the Constitution and federal statutes.” *Crumpton v. Gates*, 947 F.2d 1418,
10 1420 (9th Cir. 1991). Claims under section 1983 require a plaintiff to allege (1) the
11 violation of a federally-protected right by (2) a person or official acting under the color of
12 state law. *Warner*, 451 F.3d at 1067. Further, to prevail on a § 1983 claim, the plaintiff
13 must establish each of the elements required to prove an infringement of the underlying
14 constitutional or statutory right.

15 B. Claim I - Eighth Amendment – Deliberate Indifference to Serious 16 Medical Needs

17 The Eighth Amendment “embodies broad and idealistic concepts of dignity,
18 civilized standards, humanity, and decency” by prohibiting the imposition of cruel and
19 unusual punishment by state actors. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (internal
20 quotation omitted). The Amendment’s proscription against the “unnecessary and wanton
21 infliction of pain” encompasses deliberate indifference by state officials to the medical
22 needs of prisoners. *Id.* at 104 (internal quotation omitted). It is thus well established that
23 “deliberate indifference to a prisoner’s serious illness or injury states a cause of action
24 under § 1983.” *Id.* at 105.

25 Courts in Ninth Circuit employ a two-part test when analyzing deliberate
26 indifference claims. The plaintiff must satisfy “both an objective standard—that the
27 deprivation was serious enough to constitute cruel and unusual punishment—and a
28 subjective standard—deliberate indifference.” *Colwell v. Bannister*, 763 F.3d 1060, 1066

1 (9th Cir. 2014) (internal quotation omitted). First, the objective component examines
2 whether the plaintiff has a “serious medical need,” such that the state’s failure to provide
3 treatment could result in further injury or cause unnecessary and wanton infliction of pain.
4 *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006). Serious medical needs include those
5 “that a reasonable doctor or patient would find important and worthy of comment or
6 treatment; the presence of a medical condition that significantly affects an individual’s
7 daily activities; or the existence of chronic and substantial pain.” *Colwell*, 763 F.3d at 1066
8 (internal quotation omitted).

9 Second, the subjective element considers the defendant’s state of mind, the extent
10 of care provided, and whether the plaintiff was harmed. “Prison officials are deliberately
11 indifferent to a prisoner’s serious medical needs when they deny, delay, or intentionally
12 interfere with medical treatment.” *Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002)
13 (internal quotation omitted). However, a prison official may only be held liable if he or she
14 “knows of and disregards an excessive risk to inmate health and safety.” *Toguchi v.*
15 *Chung*, 391 F.3d 1050, 1057 (9th Cir. 2004). The defendant prison official must therefore
16 have actual knowledge from which they can infer that a substantial risk of harm exists,
17 and also make that inference. *Colwell*, 763 F.3d at 1066. An accidental or inadvertent
18 failure to provide adequate care is not enough to impose liability. *Estelle*, 429 U.S. at 105–
19 06. Rather, the standard lies “somewhere between the poles of negligence at one end
20 and purpose or knowledge at the other. . .” *Farmer v. Brennan*, 511 U.S. 825, 836 (1994).
21 Accordingly, the defendants’ conduct must consist of “more than ordinary lack of due
22 care.” *Id.* at 835 (internal quotation omitted).

23 Moreover, the medical care due to prisoners is not limitless. “[S]ociety does not
24 expect that prisoners will have unqualified access to health care....” *Hudson v. McMillian*,
25 503 U.S. 1, 9 (1992). Accordingly, prison officials are not deliberately indifferent simply
26 because they selected or prescribed a course of treatment different than the one the
27 inmate requests or prefers. *Toguchi*, 391 F.3d at 1058. Only where the prison officials’
28 “‘chosen course of treatment was medically unacceptable under the circumstances,’ and

1 was chosen ‘in conscious disregard of an excessive risk to the prisoner’s health,’” will the
2 treatment decision be found unconstitutionally infirm. *Id.* (quoting *Jackson v. McIntosh*,
3 90 F.3d 330, 332 (9th Cir. 1996)). In addition, it is only where those infirm treatment
4 decisions result in harm to the plaintiff—though the harm need not be substantial—that
5 Eighth Amendment liability arises. *Jett*, 439 F.3d at 1096.

6 **1. Analysis**

7 In Claim I, Morris asserts a claim for deliberate indifference to serious medical
8 needs related to the treatment of his back. As to the objective element of this deliberate
9 indifference claim, the parties do not dispute that Morris’s back issues constitute a serious
10 medical need. Thus, the Court finds that the objective element of deliberate indifference
11 has been satisfied.

12 As to the subjective element, Defendants assert they were not deliberately
13 indifferent to Morris’s serious medical needs and Morris has no evidence that surgery was
14 deemed appropriate by a medical provider any time prior to the fall that occurred on
15 February 2, 2018. (ECF No. 65 at 8-17.) However, confusingly, Defendants acknowledge
16 that an MRI conducted in March of 2016 indicated Morris needed surgery for his back
17 pain. (*Id.* at 11; ECF No. 68-1 at 40, 43; ECF No. 68-5 at 10.) Morris disputes that
18 Defendants have established Morris received adequate medical care in relation to his
19 back and asserts that Defendants have failed to show that waiting to perform surgery until
20 it was needed on an emergency basis was not deliberate indifference. (See ECF No. 83.)

21 First, the medical records provided by Defendants are properly authenticated
22 under Fed. R. Evid. 901 through the declaration submitted by Health Information
23 Coordinator, Erin Kruse. (ECF No. 65-1.) However, aside from defense counsel’s own
24 opinion or interpretation of those medical records and/or medical diagnoses, Defendants
25 do not provide any further evidence, such as declarations from medical professionals
26 regarding Morris’s medical treatment, responses to interrogatories, etc., to support their
27 position. The Court cannot consider either in form or substance, defense counsel’s own
28 personal opinions or interpretations concerning any medical diagnoses or records in its

1 decision. Further, the medical records provided by Defendants are mostly illegible and
2 appear to only cover a limited time-period. (See footnote 5, above.) Thus, it is unclear to
3 the Court that Morris's medical needs were, in fact, adequately addressed. On this basis
4 alone, the Court finds Defendants have failed to meet their initial burden of establishing
5 that no material issue of fact exists as to the claim.

6 However, even assuming Defendants' materials were fully legible, in reviewing
7 what the Court can from the medical records provided, the Court finds that a genuine
8 issue of material fact exists as to whether the chosen course of treatment was medically
9 acceptable under the circumstances and whether the treatment was chosen in conscious
10 disregard of an excessive risk to Morris's health. The records before the Court seem to
11 indicate that although surgery appears to have been recommended as far back as March
12 of 2016, surgery was not provided to Morris until after his fall in February 2018, at which
13 point surgery was performed on an emergency basis. Defendants acknowledge that an
14 MRI conducted in March of 2016 indicated Morris needed surgery. Thus, the Court has
15 concerns about whether the delay in providing surgery was medically acceptable under
16 the circumstances. Further, it is unclear to the Court whether the chosen course of
17 treatment, which appears to be rather conservative in nature, was medically acceptable
18 under the circumstances. Because Defendants do not address these issues or provide
19 admissible evidence to address these issues, there is a factual dispute as to whether the
20 chosen treatment and delay in surgery were medically acceptable under the
21 circumstances.

22 Finally, Defendants argue Morris is unable to prove that Defendants knew of a
23 serious medical need and disregarded the excessive risk to this health. However, given
24 all of the above, it is possible for a jury to find that the chosen course of treatment and
25 delay in providing surgery were chosen in conscious disregard of an excessive risk to
26 Morris's health.

27 Because Defendants do not provide the Court with sufficient evidence to show that
28 they were not deliberate indifferent to Morris's serious medical needs as it relates to

1 treatment of his back, the Court finds Defendants failed to meet their initial burden of
 2 establishing that no material issues of fact exist as to Morris's claim. Further, the Court
 3 cannot say as a matter of law or fact that Defendants were not deliberately indifferent to
 4 Morris's serious medical needs, which ultimately resulted in him undergoing emergency
 5 surgery and suffering further medical problems. Accordingly, summary judgment should
 6 be denied as to Morris's claim that Defendants were deliberately indifferent to his serious
 7 medical needs.⁸

8 **2. Qualified Immunity**

9 The Eleventh Amendment bars damages claims and other actions for retroactive
 10 relief against state officials sued in their official capacities. *Brown v. Oregon Dept. of*
 11 *Corrections*, 751 F.3d 983, 988–89 (9th Cir. 2014) (citing *Pennhurst State Sch. & Hosp.*
 12 *v. Halderman*, 465 U.S. 89, 100 (1984)). State officials who are sued individually may
 13 also be protected from civil liability for money damages by the qualified immunity doctrine.
 14 More than a simple defense to liability, the doctrine is “an entitlement not to stand trial or
 15 face other burdens of litigation . . .” such as discovery. *Mitchell v. Forsyth*, 472 U.S. 511,
 16 526 (1985).

17 When conducting a qualified immunity analysis, the Court asks “(1) whether the
 18 official violated a constitutional right and (2) whether the constitutional right was clearly
 19 established.” *C.B. v. City of Sonora*, 769 F.3d 1005, 1022 (9th Cir. 2014) (citing *Pearson*
 20 *v. Callahan*, 555 U.S. 223, 232, 236 (2009)). A right is clearly established if it would be
 21 clear to a reasonable official in the defendant's position that his conduct in the given
 22 situation was constitutionally infirm. *Anderson v. Creighton*, 483 U.S. 635, 639–40,
 23 (1987); *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 915 (9th Cir. 2012). The Court may
 24 analyze the elements of the test in whatever order is appropriate under the circumstances
 25

26 ⁸ To the extent Defendants argue a lack of personal participation as to Aranas, Mar,
 27 and Mitchell, the Court also finds genuine issues of material fact exist as to their personal
 28 involvement in treating Morris, for many of the same reasons discussed above.

1 of the case. *Pearson*, 555 U.S. at 240–42.

2 “[J]udges of the district courts... should be permitted to exercise their sound
3 discretion in deciding which of the two prongs of the qualified immunity analysis should
4 be addressed first in light of the circumstances in the particular case at hand.” *Pearson*,
5 555 U.S. at 236. “[W]hether a constitutional right was violated... is a question of fact.”
6 *Tortu v. Las Vegas Metro. Police Dep’t*, 556 F.3d 1075, 1085 (9th Cir. 2009). While the
7 Court decides as a matter of law the “clearly established” prong of the qualified immunity
8 analysis, only the jury can decide the disputed factual issues. *See Morales v. Fry*, 873
9 F.3d 817, 824-25 (9th Cir. 2017); *Reese v. Cty. Of Sacramento*, 888 F.3d 1030, 1037 (9th
10 Cir. 2018). While the Court finds a genuine issue of material fact exists as to whether
11 Morris’s constitutional rights were violated, the Court will address the “clearly established”
12 prong at this time.

13 Defendants contend they are entitled to qualified immunity because “Morris has
14 not alleged and cannot demonstrate that there exists a clearly established right to any
15 specific medical treatment, based upon an unproduced recommendation for surgery,
16 other than the significant treatment that he received.” (ECF No. 65 at 14-15.) According
17 to Defendants, there must be a case directly on point directing medical professionals
18 within the prison setting to provide a certain course of treatment. This position has
19 expressly been rejected by the Supreme Court and the Ninth Circuit. It is not required that
20 there be a case directly on point before concluding that the law is clearly established, “but
21 existing precedent must have placed the statutory or constitutional question beyond
22 debate.” *Stanton v. Sims*, 571 U.S. 3, 6 (2013) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731,
23 743 (2011)). “For a right to be clearly established it is not necessary that the very action
24 in question have previously been held unlawful.” *Jackson v. McIntosh*, 90 F.3d 330, 332
25 (9th Cir. 1996) (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). “To define the
26 law in question too narrowly would be to allow defendants to define away all potential
27 claims.” *Jackson*, 90 F.3d at 332 (citing *Kelley v. Borg*, 60 F.3d 664, 667 (9th Cir. 1995)).

28 Defendants’ argument that Morris failed to identify which clearly established law

1 each Defendant violated is unconvincing. Morris alleges that the delay in providing a
2 recommended back surgery constituted deliberate indifference. It is settled law that
3 deliberate indifference to serious medical needs of prisoners violates the Eighth
4 Amendment. *Jackson*, 90 F.3d at 332 (9th Cir. 1996) (citing *Estelle*, 429 U.S. at 104).
5 Specifically, it is settled law that choosing a course of treatment that is medically
6 unacceptable under the circumstances and is chosen in conscious disregard of an
7 excessive risk to an inmate's health is a constitutional violation. *Toguchi*, 391 F.3d at 1058
8 (citing *Jackson*, 90 F.3d at 332). Further, intentionally delaying access to medical care or
9 intentionally interfering with treatment once it is prescribed can constitute deliberate
10 indifference. See *Estelle*, 429 U.S. at 104-05. Thus, the constitutional right was clearly
11 established such that reasonable prison officials would have known that intentionally
12 delaying or interfering with treatment constitutes unlawful deliberate indifference.
13 Accordingly, the Court finds that the constitutional right is clearly established, and
14 Defendants are not entitled to qualified immunity.

15 **C. Claim II - Eighth Amendment – Deliberate Indifference to Serious**
16 **Threats to Inmate's Safety**

17 Under the Eighth Amendment, prison conditions should not “involve the wanton
18 and unnecessary infliction of pain” or be “grossly disproportionate to the severity of the
19 crime warranting imprisonment.” *Rhodes v. MO Chapman*, 452 U.S. 337, 347 (1981).
20 “Prison officials have a duty to ensure that prisoners are provided adequate shelter, food,
21 clothing, sanitation, medical care, and personal safety.” *Johnson v. Lewis*, 217 F.3d 726,
22 731 (9th Cir. 2000).

23 To establish a violation of these duties, the inmate must establish that prison
24 officials were “deliberately indifferent” to serious threats to the inmate's safety. *Farmer*,
25 511 U.S. at 834. Under the deliberate indifference standard, a violation of the Eighth
26 Amendment is only found when an objective and subjective component are met. See *id.*
27 at 834.

28 When an inmate claims prison officials failed to take reasonable steps

1 to protect him, he must show that “he is incarcerated under conditions posing a
2 substantial risk of serious harm.” *Id.* (citations omitted). This is a question of fact, and
3 “must be decided by the jury if there is any room for doubt.” *Lemire v. Cal. Dep’t of Corr.*
4 *and Rehab.*, 726 F.3d 1062, 1075 (9th Cir. 2013) (citation omitted). “[T]o satisfy the
5 objective prong, it is enough for the inmate to demonstrate that he was exposed to a
6 substantial risk of some range of serious harms; the harm he actually suffered need not
7 have been the most likely result among this range of outcomes.” *Id.* at 1076 (citing *Gibson*
8 *v. Cnty. of Washoe, Nev.*, 290 F.3d 1175, 1193 (9th Cir. 2002)). It does not matter
9 “whether a prisoner faces an excessive risk ... for reasons personal to him or because all
10 prisoners in his situation face such a risk.” *Farmer*, 511 U.S. at 843.

11 The inmate must also satisfy the subjective element. This means that the prison
12 official being sued must have known of and disregarded the risk to the inmate's safety.
13 *Farmer*, 511 U.S. at 837. “Mere negligence is not sufficient to establish liability.” *Frost v.*
14 *Agnos*, 152 F.3d 1124, 1128 (9th Cir. 1998). Further, a plaintiff “must also demonstrate
15 that the defendants’ actions were both an actual and proximate cause of their injuries.”
16 *Lemire v. California*, 726 F.3d 1062, 1074 (9th Cir. 2013) (citing *Conn v. City of Reno*,
17 591 F.3d 1081, 1098-1101 (9th Cir. 2010), *vacated by City of Reno, Nev. v. Conn*, 563
18 U.S. 915 (2011), *reinstated in relevant part* 658 F.3d 897 (9th Cir. 2011)).

19 Defendants do not contest that Morris satisfies the objective element, as the risk
20 of harm due to falling from a top bunk due to a medical condition is an objectively serious
21 risk of harm. (ECF No. 65 at 19.) However, Defendants contest that Morris can meet the
22 subjective element, as he must demonstrate more than mere negligence. (*Id.*) Morris
23 opposes Defendants’ motion for summary judgment and also files his own cross-motion
24 for summary judgment as to the unsafe prison conditions claim. (ECF No. 83.) In his
25 cross-motion for summary judgment, Morris asserts that based upon undisputable
26 evidence, Miller and Conlin were deliberately indifferent to Morris’s serious medical needs
27 and that indifference was the contributing and proximate cause of the injuries suffered by
28 Morris resulting in his fall down the stairs on February 2, 2018. (*Id.* at 69-74.)

1 First, the Court finds that placing Morris on the top tier, top bunk despite having
2 medical restrictions constitutes deliberate indifference. See e.g., *Lewis v. Endell*, No.
3 2:08-CV-00157-RLH-PAL, 2008 WL 4866316 at *6 (D. Nev. Nov. 7, 2008) (finding for
4 qualified immunity purposes that it was clearly established that failure to move an inmate
5 with seizure disorder to a lower bunk for seven months was deliberate indifference) (citing
6 *Estelle*, 429 U.S. at 99 (doctor ordered prisoner moved from upper bunk to lower bunk to
7 avoid injury)); *Ramos v. Monteiro*, No. CV 06-0832-GAF (JTL), 2009 WL 1370998 at *14-
8 15 (C.D. Cal. May 14, 2009) (finding that plaintiff had adequately alleged that, based on
9 his medical condition, an upper bunk posed a substantial risk to his safety to support a
10 claim of deliberate indifference).

11 The undisputed facts before the Court establish that Morris has consistently had a
12 lower bunk/lower tier medical disability noted since his initial intake into the NDOC on
13 October 19, 1999. The undisputed facts establish that on October 6, 2017, Morris was
14 transferred to a cell located on the top tier and on the top bunk. The undisputed facts
15 further establish that on February 2, 2018, while being escorted from the top tier, Morris
16 fell down the stairs and suffered injuries that required emergency surgery. Whether the
17 failure to provide Morris with a lower tier/lower bunk to accommodate his medical
18 problems was done with knowledge that there was a valid medical order in existence, is
19 the subject of a genuine dispute of material fact. Further, there is a genuine dispute of
20 material fact as to who was responsible for assigning housing.

21 Morris's assertion is that Baca, Miller, and Conlin knew, or should have known,
22 that there was medical classification requiring he be housed on a lower tier/lower bunk
23 and that the Defendants were all responsible for housing assignments; Baca, Miller, and
24 Conlin state they were not involved in assigning housing or were otherwise unaware of
25 Morris's medical restriction. It is not the Court's role to weigh conflicting evidence or make
26 credibility determinations, but only to determine whether there is a genuine issue of
27 material fact for trial. *Summers*, 127 F.3d at 1152. Accordingly, because the Court finds
28 that genuine issues of material fact exist that preclude summary judgment, the Court

1 recommends that motions for summary judgment (ECF Nos. 65, 83) be denied.

2 **D. Exhaustion of Administrative Remedies**

3 In addition to the arguments asserted above, Defendants also argue that summary
4 judgment should be granted because Morris failed to exhaust his administrative remedies
5 as to his second claim for relief. (ECF No. 65 at 22-24.) Defendants assert that “[a] review
6 of Morris’s grievance records shows that he grieved the bunk issue at the informal level
7 but failed to appeal the decision to the First or Second level.” (*Id.* at 23.)

8 Morris filed an informal grievance, # 2006-30-63488 on May 25, 2018, and sought
9 to “not be housed upstairs.” (ECF No. 66 at 29-31.) His informal grievance was granted
10 on September 20, 2018, stating “An alert Warning has been added along with a
11 corresponding case note in relation to this grievance to ensure you are not housed on a
12 top tier bed assignment in the future.” (*Id.* at 27.) Despite that Morris’s grievance was
13 granted, in its entirety, Defendants argue that because Morris is pursuing “money
14 damages and extraordinary relief,” he was required to complete the PLRA exhaustion
15 process. (ECF No. 65 at 24.)

16 Under the Prison Litigation Reform Act (“PLRA”), “[n]o action shall be brought
17 with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by
18 a prisoner confined in any jail, prison, or other correctional facility until such administrative
19 remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). Exhaustion is
20 mandatory. *Porter v. Nussle*, 534 U.S. 516, 524 (2002). The requirement’s underlying
21 premise is to “reduce the quantity and improve the quality of prisoner suits” by affording
22 prison officials the “time and opportunity to address complaints internally before allowing
23 the initiation of a federal case. In some instances, corrective action taken in response to
24 an inmate’s grievance might improve prison administration and satisfy the inmate, thereby
25 obviating the need for litigation.” *Id.* at 524–25. The PLRA requires “proper exhaustion”
26 of an inmate’s claims. *Woodford v. Ngo*, 548 U.S. 81, 90 (2006). Proper exhaustion
27 means an inmate must “use all steps the prison holds out, enabling the prison to reach
28 the merits of the issue.” *Griffin v. Arpaio*, 557 F.3d 1117, 1119 (9th Cir. 2009) (citing

1 *Woodford*, 548 U.S. at 90).

2 Administrative Regulation (“AR”) 740 governs the grievance process at NDOC
3 institutions. An inmate must grieve through all three levels: (1) Informal; (2) First Level;
4 and (3) Second Level. (See generally ECF No. 66-1 at 22-37.) However, AR 740.03.6(C)
5 states: “[i]f the Grievance is “**Granted**” at any level, the grievance process is considered
6 complete and the inmate’s administrative remedies exhausted, and the inmate cannot
7 appeal the decision to a higher level.” (*Id.* at 26.)

8 A review of the authenticated evidence shows that Morris filed an informal
9 grievance regarding the claims asserted in the complaint, which was granted. Pursuant
10 to AR 740, when his informal grievance was granted, Morris successfully completed the
11 grievance process and exhausted his administrative remedies. Defendants seem to
12 contend that because Morris seeks a different form of relief in this lawsuit than he sought
13 in his grievance, that this means he failed to exhaust. However, Defendants fail to cite to
14 any binding authority that supports this assertion. Thus, the Court finds that the
15 Defendants have not shown Morris failed to exhaust before initiating this action.

16 **V. CONCLUSION**

17 For good cause appearing and for the reasons stated above, the Court
18 recommends that Defendants’ motion for summary judgment, (ECF No. 65), be denied
19 and Morris’s cross-motion for summary judgment, (ECF No. 83), be denied.

20 The parties are advised:

21 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of
22 Practice, the parties may file specific written objections to this Report and
23 Recommendation within fourteen days of receipt. These objections should be entitled
24 “Objections to Magistrate Judge’s Report and Recommendation” and should be
25 accompanied by points and authorities for consideration by the District Court.

26 2. This Report and Recommendation is not an appealable order and any
27 notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the
28 District Court’s judgment.

1 **VI. RECOMMENDATION**

2 **IT IS THEREFORE RECOMMENDED** that Defendants' motion for summary
3 judgment, (ECF No. 65), be **DENIED**.

4 **IT IS FURTHER RECOMMENDED** that Morris's cross-motion for summary
5 judgment, (ECF No. 83), be **DENIED**.

6 **DATED:** December 14, 2021.

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UNITED STATES MAGISTRATE JUDGE